



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

July 29, 1994

Mr. Jim Riley
Interim Executive Director
Texas Department of Criminal Justice
P.O. Box 13084
Austin, Texas 78711-3251

Letter Opinion No. 94-062

Re: Whether convicted felons awaiting transfer in county jails to substance abuse felony program facilities or the state boot camp program, are within subchapter F, chapter 499 of the Government Code for purposes of state compensation to counties (ID# 23297)

Dear Mr. Riley:

Sections 499.122 of the Government Code provides for monthly counts by the Commission on Jail Standards of inmates held in county jails "awaiting transfer to the *institutional division* [of the Texas Department of Criminal Justice] following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom all paperwork and processing required under Section 8(a), article 42.09, Code of Criminal Procedure, for transfer have been completed." (Emphasis added.) Other provisions in subchapter F, chapter 499, Government Code, sections 499.123 and 499.124, provide for state compensation to counties for holding such inmates. You ask whether two classes of convicted felons awaiting transfer in county jails are to be counted under subchapter F: those ordered to participate in the substance abuse felony program ("SAFP") or the state boot camp program. You suggest that such inmates are not "awaiting transfer to the institutional division" within the meaning of subchapter F. You argue that those provisions are rather directed at inmates "who are sentenced to and flow through the traditional prison system."

As for the part of your question pertaining to convicted felons held in county jails awaiting transfer to the state boot camp program, we note that section 499.052, Government Code, directs the institutional division to establish and operate the state boot camp program. Moreover, we read article 42.12, section 8(a), of the Code of Criminal Procedure, to contemplate that a convicted felon recommended for placement in the state boot camp program will be "received into custody by the institutional division." Even if convicted felons recommended for boot camp do not "flow through the traditional prison system," we think that, nevertheless, in awaiting transfer to state boot camp they are "awaiting transfer to the institutional division" within the meaning of subchapter F.¹

¹We note that we find no provisions specific to the "paperwork and processing" of prisoners awaiting transfer to state boot camp. Cf. Gov't Code § 499.052 (state boot camp participants need not "undergo the complete reception and diagnostic process required of other inmates). Completion of "paperwork and processing" under Code of Criminal Procedure article 42.09 is a prerequisite to the counting of prisoners under Government Code section 499.122. For purposes of this opinion, we assume

The provisions relating to SAFP, on the other hand, do not expressly link SAFP to the institutional division of TDCJ such that it is clear that an inmate awaiting transfer to SAFP "awaiting transfer to the institutional division." Section 14, article 42.12, Code of Criminal Procedure, characterizes SAFP as a program a court may require as a "condition of community supervision," where the "court places a defendant on community supervision as an alternative to imprisonment." Section 493.009 of the Government Code directs TDCJ generally, not the "institutional division" specifically, to establish this program in cooperation with the Texas Commission on Alcohol and Drug Abuse. We note, too, that subsection (f)(3) and (4) of section 493.009 provides that when probation or parole of persons in the program is revoked because they have proved unsuitable for the program, "the admission of the defendant to the institutional division is an admission for which the county from which the defendant was sentenced is charged under the allocation formula established under Section 499.071." This suggests that inmates are considered to be admitted to the institutional division only once transferred upon such revocation and that SAFP facilities are distinct from the institutional division. We conclude that, as the provisions governing SAFP lack any indicia linking SAFP to the institutional division and moreover affirmatively indicate that admission to the institutional division is distinct from admission to SAFP, felons in county jails awaiting transfer to SAFP are not within the scope of the count and payment provisions of subchapter F.

We note that a brief received in connection with this request argues that not including inmates awaiting transfer to SAFP under the count and payment provisions in subchapter F, would be to "substitute[] form over substance" and moreover to construe state law as inconsistent with recent court judgments which the brief asserts require state compensation to counties for the latters' holding of any prisoners awaiting transfer to TDCJ. See *Alberti v. Sheriff*, 937 F.2d 984 (5th Cir. 1991), *cert. denied*, *Richards v. Lindsay*, 112 S. Ct. 1994 (1992); *County of Nueces v. Texas Bd. of Corrections*, No. 452,071 (250th Dist. Ct., Travis County, Tex., Aug. 22, 1990).

You have not asked us here to construe the referenced court judgments, and we do not purport to. It may be that those judgments create broader compensation obligations for the state *vis-à-vis* felons held in county jails than do state statutes. If that is the case, enforcement of those obligations may be pursued under those judgments.

Further, as for construction of the statutes at issue here, we decline to treat them, in disregard of the actual language of the provisions, as intended merely to reflect those judgments. For example, it would appear that an even more substantial portion of convicted felons are sentenced to the state jail system created in 1993 (in the same bill which carried the current SAFP provisions) than are committed to the SAFP and state boot camp programs at issue here. See Acts 1993, 73d Leg., ch. 988. The legislature was presumably cognizant, at the 1993 session, of the court judgments referenced in the

(footnote continued)

that the requisite "paperwork and processing" have been completed with respect to the prisoners awaiting transfer to state boot camp at issue here.

above-mentioned brief. Yet state jails are expressly placed by the those 1993 statutes under a new state jail division within TDCJ, distinct from the institutional division. See Gov't Code ch. 507. Construing such laws as being intended simply to reflect the court judgments as characterized in the above-mentioned brief would require either ignoring the reference to "institutional division" in subchapter F or ignoring those parts of the state jail provisions placing them under a distinct state jail division within TDCJ.² We are not prepared to undertake such a rewriting of the law, that being a matter for the legislature if it sees fit. Similarly, as we find no indication in the SAFF provisions that the legislature intended that prisoners in county jails awaiting transfer to SAFF facilities be considered as awaiting transfer to the institutional division, we decline to read such into the law.

S U M M A R Y

Convicted felons in county jails awaiting transfer to the state boot camp program are within the provisions of subchapter F, chapter 499 of the Government Code requiring state payment for inmates "awaiting transfer to the institutional division" of the Texas Department of Criminal Justice. Prisoners awaiting transfer to substance abuse felony program facilities are not, however, within the scope of subchapter F.

Yours very truly,



William M. Walker
Assistant Attorney General
Opinion Committee

²The same may be said for the SAFF provisions as originally adopted in 1991. Acts 1991, 72d Leg., 2d C.S., ch. 10, § 19.01, at 218. Section 493.009 of the Government Code, as added by that bill, specifically provided that the substance abuse felony punishment facilities were to be established and operated "by the department, through the community justice assistance division and the pardons and paroles division" of TDCJ. Notably, the provisions in Government Code subchapter F for state payment for prisoners in county jails "awaiting transfer to the institutional division" were first added in the same 1991 bill. *Id.* § 11.02. (The 1993 amendments to section 493.009 deleted the reference to community justice assistance and pardons and paroles divisions, leaving only the word "department" from the above-quoted passage. Acts 1993, 73d Leg., ch. 988, § 3.01).